U.S. Department of Labor

Board of Alien Labor Certification Appeals
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NOTICE: This is an electronic bench opinion which has not been verified as official.

Date: 09/27/99
Case No.: **1999 INA 209**

In the Matter of:

CHARLES A. STECK, III, Employer,

on behalf of

ANGELINA EQUIZABAL, Alien.

Appearance: C. R. Exner, Esq., of Danbury, Connecticut, for the Employer and Alien
Certifying Officer: R. A. Lopez, Region I.

Before: Huddleston, Jarvis, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of ANGELINA EQUIZABAL ("Alien") by CHARLES A. STECK, III, (the "Employer") under § 212 (a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) ("the Act"), and regulations promulgated thereunder at 20 CFR Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor at Boston, Massachusetts, denied the application, and the Employer appealed pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States to perform either skilled or unskilled labor may receive a visa, if the Secretary of Labor has decided and has certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. The requirements include the responsibility of an Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means to make a good faith test of U.S. worker availability.[2]

STATEMENT OF THE CASE

On April 11, 1997, the Employer applied for alien labor certification on behalf of the Alien to fill the position of "Domestic family dinner server" in their Private Home. AF 67-68. The duties of the Job to be Performed were the following:

> Cook meals according to family preference, recipes, bake,broil, fry, boil fish, beef, chicken, pork, lamb. Wash/pare vegetables and cook, or slice for salads. Prepare sauces, gravies, salad dressing. Bake bread, rolls, muffins, cookies, cakes. Prepare snacks and store. Set dining area, clean kitchen and dining area. Wash pots, pans, cooking utensils.

AF 67, box 13. (Copied verbatim without change or correction.) The position was classified as a "Cook, domestic" under Occupational Code No. 305.281-010 of the DOT.[3] Grammar school education, but no training was specified. The experience requirement was two years in the Job Offered or in "Any job requiring cooking."[4] No "Other Special Requirement" was specified. The

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[2]Administrative notice is taken of the Dictionary of Occupational Titles, ("DOT") published by the Employment and Training Administration of the U. S. Department of Labor.

[3]305.281-010 **COOK** (domestic ser.) Plans menus and cooks meals, in private home, according to recipes or tastes of employer: Peels, washes, trims, and prepares vegetables and meats for cooking. Cooks vegetables and bakes breads and pastries. Boils, broils, fries, and roasts meats. Plans menus and orders foodstuffs. Cleans kitchen and cooking utensils. May serve meals. May perform seasonal cooking duties, such as preserving and canning fruits and vegetables, and making jellies. May prepare fancy dishes and pastries. May prepare food for special diets. May work closely with persons performing household or nursing duties. May specialize in preparing and serving dinner for employed, retired or other persons and be designated Family-Dinner Service Specialist(domestic ser.).

[4] The Alien was born 1946 and was a national of Guatemala, who was living in the United States and was working as Housecleaner in the Employer 1991 to July 1993 she was a machine operator in an injection molding business in Danbury; from July 's home under a B-1/B-2 visa at the time of application. AF 70. She had three years of elementary school education from 1952 to 1955 in Guatemala. From May 1954 to May 1960 she worked on her family farm, where she performed various duties; from May 1975 to May 1982 she worked as a child monitor in a home in Guatemala; from June 1982 to June 1985 she worked as a store sales person in Guatemala; from 1985 to 1990 she was self-employed as a caterer in Guatemala; from December 1990 to February 1991 she worked as a Domestic Family Dinner Server in Connecticut; from February 1991 to August 1994 she worked in an injection molding business and in a printing business in Connecticut. The Alien returned to her job with the injection molding manufacturer in November 1994 and continued working there until the date of application. Beginning in March 1994 and continuing until the date of application, however, the Alien also worked for the Employer in a part time position as a Housecleaner. AF 69-72.

work schedule was 10:00 a.m. to 6:00 p.m., with no provision for overtime work. The Rate of Pay was $9.18 per hour for a forty hour week. AF 67, boxes 10-12, 14, 15.[5]

Notice of Findings. Subject to the Employer's rebuttal under 20 CFR § 656.25(c), the CO denied certification in the Notice of Findings ("NOF") dated November 4, 1998. AF 37-38. The CO considered the evidence regarding full time employment, and found that the duties described in the Application did not appear to constitute full-time employment in the context of this household. The CO instructed the Employer to provide evidence that the position clearly constituted full-time employment and described the rebuttal evidence needed for such proof. At minimum the Employer was to describe the number of meals regularly served and length of preparation time required for those meals, the food service required for household entertainment events, any duties other than cooking that the worker would perform, and the identification of such other workers as regularly performed household maintenance duties in the past. AF 38.

Rebuttal. Transmitted by counsel's cover letter of December 9, 1998, Employer's rebuttal consisted of a letter by the Employer and copies of bills for entertainment during the preceding twelve month period. AF 09, *et seq*. The Employer said three or four meals were prepared daily, and fifteen to twenty meals were prepared per week, requiring forty hours a week of work. The proposed schedule itemized the work the cook would perform from 10:00 a.m. to 6:00 p.m. The Employer observed in response to the CO's questions that, "Entertainment is the primary reason for hiring the alien. We do entertain regularly on a daily basis. Last year, in the preceding 12 calendar months we probably entertained daily and 35-40 weekends." He indicated that the household had a regular cleaning service. AF 11-13.

Final Determination. Certification was denied in the Final Determination on February 22, 1999. AF 06-08. After reviewing the rebuttal, the CO said Employer failed to supply the supporting documentation for his statement as to the frequency and extent of the many home entertainment occasions described. The proof consisted solely of credit card statement identifying purchases of groceries and party supplies. Notwithstanding the assertion that entertainment was his "primary reason" for hiring a cook, the Employer did not supply persuasive proof that (1) he entertained on a daily basis and (2) that during the preceding calendar year he "entertained daily and [on] 35-40 weekends." The Employer did not provide a twelve month calendar specifically identifying a profuse entertainment schedule in the year immediately before the date of application. Instead, the rebuttal evidence consisted of credit card summaries for calendar year 1998. While many of the credit card charges were related to wholesale food suppliers, restaurants, and various retail establishments, these entries could not be deciphered and related to specific occasions when the Employer entertained in this household. The CO concluded that,

> The employer's minimal documentation to establish a frequent entertainment schedule [was] reviewed and found to be unconvincing to establish the need for a full-time cook.

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[5]The household consisted of two adults and no children. AF 10.

> Based upon the limited amount of documentation provided in rebuttal, we are unable to approve.

AF 07-08.

Appeal. On March 22, 1999, the Employer filed a request for review by BALCA, to counsel attached a statement of the grounds for review. AF 02-05. Alluding to Employer's rebuttal, counsel asserted that the proposed work schedule at AF 11-12 "itemized the exact minutes spent ... which are required to perform each task." As to Employer's failure to present a calendar of the entertainment he alleged in general terms, counsel claimed the relevant details were confidential, and that "to reveal a calendar of his business and professional contacts would necessarily require a breach of his ethical confidentiality." Instead, the statement argued that the rebuttal itemized and accounted for the proposed duties of this position "for every minute of the day," which counsel said was "a sufficiently detailed response" in lieu of the information requested by the NOF AF 03. Again alluding to confidential information involving the Employer's constituents," counsel further argued that the description of job duties was intensely detailed and said the Employer has "attained the political stature and level in life where they need and can afford a full-time private cook. For the Department of Labor to question the values and standards and necessities is appalling, inappropriate, and wrong." AF 04.

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Discussion

Burden of proof. While the Act has no bearing on an employer's hiring of a worker to cook and otherwise perform the work of a business or household, when that employer applies for alien labor certification as an exception from the operation of the Act, he must comply with the Act and regulations. The Employer has appealed the CO's denial of alien labor certification on grounds that he failed to sustain his burden of proof of the existence of full-time permanent employment within the meaning of 20 CFR § 656.3. For the reasons that follow, the Employer must carry the burden of proof as to all of the issues arising under its application pursuant to the Act and regulations.

The imposition of the burden of proof is based on the fact that alien labor certification is an exception to the general operation of the Act, by which Congress provided favored treatment for a limited class of alien workers whose skills may be shown to be needed in the U. S. labor market. 20 CFR §§ 656.1(a)(1) and (2), 656.3 ("Labor certification"). 20 CFR § 656.2(b) quoted and relied on § 291 of the Act (8 U.S.C. § 1361) to implement the burden of proof that Congress placed on applicants for alien labor certification:

> "Whenever any person makes application for a visa or any other documentation required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act... ." The legislative history of the 1965 amendments to the Immigration and

> Nationality Act establishes that Congress intended that the burden of proof in an application for labor certification is on the employer who seeks an alien's entry for permanent employment. See S. Rep. No. 748, 89th Cong., 1st Sess., reprinted in 1965 U.S.D. Code Cong. & Ad. News 3333-3334.

Moreover, the Panel is required to construe this exception strictly, and must resolve all doubts against the party invoking this exemption from the general operation of the Act. 73 Am Jur2d § 313, p. 464, citing **United States v. Allen**, 163 U. S. 499, 16 SCt 1071, 1073, 41 LEd 242 (1896).

20 CFR § 656.3. As it is well-established that certification may be denied if the employer's own evidence does not show that the position is permanent and full time, this Employer's burden of proof was to demonstrate that the proposed employment consisted of full time work by an employee in the position offered. **Dr. Vladimar Levit, M.D.,** 95 INA 540 (Jul. 15, 1997). If the employer fails to meet this burden, certification may be denied. **Gerata Systems America, Inc.**, 88 INA 344(Dec. 16, 1988). Permanent full time employment of a Household Cook requires showing that the position involves more than planning, preparing and serving household meals, even up to 25 meals per week. **Mr. & Mrs. Clifford I. Cummings**, 94 INA 008(Dec. 21, 1994); **Marianne Tamulevich,** 94 INA 054(Dec. 5, 1994); **Jane B. Horn,** 94 INA 006 (Nov. 30, 1994).[6]

In **Carlos Uy III**, 97 INA 304 (Mar. 3, 1999)(*en banc*), which BALCA recently decided *en banc*, the Board said,

> When an employer presents a labor certification application for a 'Domestic Cook,' attention immediately focuses on whether the application presents a *bona fide* job opportunity because common experience suggests that few households retain an employee whose only duties are to cook, or could even afford the luxury of retaining such an employee. The DOT contemplates that a domestic cook is a skilled, professional cook, and would be able to cook sophisticated meals, as illustrated by the much higher experience requirement. Thus such an application raises the question of whether the employer is really seeking a housekeeper, nanny, companion or other general household worker, or is attempting to create a job for the purpose of assisting the alien in immigrating to the United States. One motive for categorizing the job as a domestic cook rather than as another type of domestic worker is to avoid the long wait for a visa for an unskilled laborer under the IMMACT 1990. ...

The Board's decision in **Carlos Uy III**, *supra*, added,

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[6] **20 CFR § 656.3 Definitions, for purposes of this part, of terms used in this part.** *Act* means the Immigration and Nationality Act, as amended, 8 U.S.C. 1101 *et seq.Administrative Law Judge* means an official appointed pursuant to 5 U.S.C. 3105. ... *Employment* means permanent full time work by an employee for an employer other than oneself. For purposes of this definition an investor is not an employee.

> An employer's presentation of a position description for labor certification that in some instances strains credulity does not relieve the CO from an obligation to review the employer's rebuttal documentation and to state in the Final Determination what aspects of that documentation are deficient. ... That said, it must be observed that, if the CO's NOF provides an employer with adequate notice of the nature of the violation, the basis for the CO's challenge and instructions for rebutting or curing the deficiencies, an employer's complaint about the brevity of the CO's Final Determination on appeal will not change the fact that it was Employer's burden on rebuttal to produce sufficient evidence to show entitlement to labor certification. See **Top Sewing, Inc.**, and **Columbia Sportswear**, 1995 INA 563 and 1996 INA 038 (Jan. 28, 1997) (*per curiam*). Thus, the Board would not rule out affirming a denial of labor certification even in the absence of a fully reasoned Final Determination, if the NOF provided adequate notice, and the employer's documentation was so lacking in persuasiveness that labor certification would be precluded.

Employer's proof. In this case, the Employer stated in rebuttal that his primary reason for requiring certification was his heavy entertainment schedule. This case fits the Board's holding in **Carlos Uy III**, *supra*, in that the NOF was sufficiently clear in directing Employer to document that part of his Application that stated his "primary reason for hiring the alien." In response, the Employer asserted in rebuttal that his household entertained regularly on a daily basis and that, "Last year, in the preceding 12 calendar months, we probably entertained daily and 35-40 weekends." The CO examined the rebuttal exhibits and found a series of paid credit card bills, but the rebuttal contained no identification of the persons entertained or described the circumstances under which any such entertainment took place, however. The Employer's explanation for this omission is set forth in counsel's statement on appeal and in the appellate brief. Because his position of First Selectman of the Town of Bethel is similar to that of "Mayor" in a larger city, counsel argued,

> As First Selectman, an elected position, he entertains frequently and regularly. However, many of the constituents, clients, citizenry with whom he meets are of a confidential nature, inherent in his position, and to reveal a calendar of his business and professional contacts would necessarily require a breach of his ethical confidentiality. For this reason , his position does not allow him to feel comfortable providing you with a calendar of his entertainment. The lack of a 1998 calendar should not be the deciding factor in this matter. In lieu of that, he did provide a thorough and complete response to all other questions posed in the notice of Findings.

Brief, p. 2.

First, the Employer, himself, said none of this. All of these assertions were the unsupported statements by his attorney in the reasons for appeal and the brief. Assertions by employer's counsel do not constitute evidence when not supported by statements of a person with knowledge of the facts. **Moda Linea, Inc.**, 90 INA 025(Dec. 11, 1991). The Board has consistently rejected the allegations of counsel as a basis for the employer's assertions. See

Re/Max Realty Group, 95 INA 015 (Jul. 19, 1996); **Sarah and Norman Jaffe**, 94 INA 513 (Oct. 30, 1995); **Wong's Palace Chinese Restaurant**, 94 INA 410 (Oct. 12, 1995). Although **Modular Container Systems, Inc.**, 89 INA 228 (July 16, 1991)(*en banc*), held that an attorney may be competent to testify about matters of which he has first-hand knowledge, this exception does not apply to counsel's statements of fact in this appeal, since no evidence of any such first hand knowledge appeared in this Appellate File. It follows that after weighing the record, the Panel has concluded that counsel's remarks in the brief were allegations of fact that merit no weight as evidence, as they were neither corroborated by documentation nor supported by the statement of a person with knowledge of the facts. **Moda Linea, Inc.**, 90 INA 025 (Dec. 11, 1991).

Consequently, there is no evidence that any of the unidentified persons he entertained were the Employer's constituents, clients, and miscellaneous citizenry of Bethel, that his meetings with them concerned subjects that were of a confidential nature, that the Employer was excused from compliance with the NOF by any alleged right of privacy he assumed to be inherent in his position as the First Selectman of the Town of Bethel, that the calendar of entertainment requested in the NOF would include the Employer's business and professional contacts, or that its disclosure "would necessarily require a breach of [the Employer's] ethical confidentiality." Under BALCA's holding in **Yaron Development Co., Inc.**, 89 INA 178 (Apr. 19, 1991)(*en banc*), the novel theories and assumptions of fact stated in the Employer's brief cannot serve as evidence of material facts, notwithstanding the assertions in counsel's appellate argument. For this reason the contention that the Employer's elective position as the First Selectman of the Town of Bethel "does not allow him to feel comfortable providing [the CO] with a calendar of his entertainment" requested in the NOF, was properly disregarded in reaching the Final Determination.

It is well-established that the NOF must give adequate notice of deficiencies to provide an employer an opportunity to rebut or cure the alleged defects. **Downey Orthopedic Medical Group**. 87 INA 674 (Mar. 16, 1988)(*en banc*). The failure provide an adequate warning in the NOF violates 20 CFR § 656.25 and denies due process. **North Shore Health Plan**, 90 INA 060 (Jun. 30, 1992). This NOF clearly and specifically told the Employer what it must show to rebut or cure the deficiencies noted, however. See **Potomac Foods, Inc.**, 93 INA 309 (Jul. 26, 1994). First, the NOF identified all of the governing regulations that the Employer had violated. **Flemah, Inc.**, 88 INA 062 (Feb. 21, 1989)(*en banc*). Contrary to Employer's contention, the NOF described the nature of the violation in explicit language that addressed the specific facts of this Application and was not "mere boilerplate." **Sizzler Restaurants International**, 88 INA 123 (Jan. 9, 1989)(*en banc*). Second, the NOF made adequate references to the evidence used in reaching these findings. **Shaw's Crab House**, 87 INA 714 (Sep. 30, 1988)(*en banc*). Finally, the NOF specified the evidence that Employer was required to proffer in order to rebut or cure the deficiency found. Compare **Peter Hsieh**, 88 INA 540 (Nov. 30, 1989).

The Employer's vague and incomplete rebuttal documentation did not suffice to carry his burden of proof under the Act and regulations. **Analysts International Corp.**, 90 INA 387 (July

30, 1991). A bare assertion without supporting reasoning or evidence generally is insufficient to carry an employer's burden of proof. As the statements in the Employer's brief lack factual support, they were insufficient to demonstrate the existence of a *bona fide* position of employment within the meaning of 20 CFR § 656.3. **Interworld Immigration Service**, 88 INA 490 (Sept. 1, 1989), citing **Tri-P's Corp.**, 88 INA 686 (Feb 17, 1989).

Since the NOF request of proof of the nature and extent of Employer's entertainment commitments was appropriate and was consistent with Employer's assertion of the importance of this element to the duties of the Job Offered, the CO's denial of labor certification was consistent with the evidence of reacord. **Norwood Computer Services, Inc.**, 93 INA 232(July 8, 1994); **Edward Gerry,** 93 INA 467(June 13, 1994). Consequently, the Panel finds that Certifying Officer correctly concluded that the Employer did not sustain his burden of proof.

Accordingly, the following order will enter.

ORDER

The Certifying Officer's Final Determination denying labor certification is hereby affirmed.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

Judge Huddleston dissents as follows:

I respectfully dissent from the majority and would remand this matter for reconsideration under our holding in **Carlos Uy III**, 1997 INA 334 (Mar. 3, 1999)(*en banc*).
The Certifying Officer's determination and the Employer's rebuttal occured prior to that decision and at a time when the issue of full-time employment within the context of domestic cook cases was very unsettled.

Richard E. Huddleston (s/s)

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

Case No.: **99 INA 209**
CHARLES A. STECK, III, Employer,
ANGELINA EQUIZABAL, Alien.

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Jarvis			
Huddleston			

Thank you,

Judge Neusner

Date: June 24, 1999